IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE COX,

Plaintiff,

ORDER
00-C-161-C

JON E. LITSCHER, STEVEN SCHNEITER, CHARLES BLANCHETT, PERCY PITZER, OFFICER JOHN DOE #1, OFFICER JOHN DOE #2 and OFFICER JOHN DOE #3,

Defendants.

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This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Dwayne Cox is presently confined at the Supermaximum Correctional Institution in Boscobel, Wisconsin but was confined at the Corrections Corporation of America - Whiteville Correctional Facility in Tennessee at all times relevant to the complaint. In an order entered on May 26, 2000, I granted plaintiff leave to proceed in forma pauperis on his Eighth Amendment claims of excessive force against defendants John Doe #1, John Doe #2 and John Doe #3; conditions of confinement against defendants Charles Blanchett and Percy Pitzer; and failure to protect from harm against defendants Jon E. Litscher, Steven Schneiter, Blanchett and Pitzer. In that same order, I denied plaintiff's request

for leave to proceed in forma pauperis on his procedural due process claim.

Presently before the court is the motion of defendants Jon E. Litcher and Steven Schneiter to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants Litscher and Schneiter are employees of the Wisconsin Department of Corrections and the remaining defendants are employees of the Corrections Corporation of America. In the May 26 order, I held that because plaintiff had no remedy available to him through the administrative process to complain of his alleged Eighth Amendment violations that occurred at the Corrections Corporation of America - Whiteville Correctional Facility in Tennessee, I would consider his claims without requiring him to provide proof of administrative exhaustion. In their motion to dismiss, defendants Litscher and Schneiter contend that plaintiff's complaint should be dismissed because he failed to exhaust his administrative remedies before filing suit against them. Upon reconsideration, I agree that plaintiff failed to exhaust the requisite administrative remedies before he filed this lawsuit and as a result, defendants' motion will be granted.

Also before the court are plaintiff's request for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15 and his motion for appointment of counsel. Plaintiff's motion for leave to file an amended complaint will be denied because such an amendment would be futile and his motion for appointment of counsel will be stayed pending a determination

whether he exhausted his claims against defendants Blanchett, Pitzer, John Doe #1, John Doe #2 and John Doe #3.

The facts as alleged by plaintiff are included in the May 26, 2000 order allowing plaintiff to proceed with his complaint and will not be repeated here.

I. MOTION TO DISMISS

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v.

Helman, 196 F.3d 727 (7th Cir. 1999).

The Seventh Circuit has adopted an expansive reading of the applicability of § 1997e(a), stating "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733. Further emphasizing the importance of exhausting administrative remedies before filing suit, the court of appeals has made clear that "[t]here is no futility exception to § 1997e(a)," Perez, 182 F.3d at 537; see also Massey, 196 F.3d at 733, and that a prisoner's request for monetary damages that are unavailable under the administrative complaint system does not allow a prisoner to avoid 42 U.S.C. § 1997e's exhaustion requirement. See Perez, 182 F.3d at 537-38; see Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust when seeking money damages not available through prison grievance procedure).

In dicta in Perez, 182 F.3d at 538, Judge Easterbrook set forth a hypothetical situation that might fall into a narrow exception to § 1997e's exhaustion requirement

> in which the harm is done and no further administrative action could supply *any* 'remedy.' Suppose a prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the

> administrative process cannot provide compensation then there is no administrative remedy to exhaust.

But see Nyhuis, 204 F.3d at 69 ("A subsequent panel for the Seventh Circuit Court of Appeals cast doubt on the extent of this exception, calling it dicta and not applying it to the case at bar.") (citing Massey, 196 F.3d at 734). Although Judge Easterbrook's hypothetical makes good sense, it is hard to square it with the strict approach the court of appeals has taken to prisoner suit exhaustion requirements. Why would a healed broken leg be any different from a beating by a guard who is no longer employed, an allegedly illegal transfer to another prison from which the prisoner has now been returned or any other event unlikely to be repeated?

A strong argument can be made that plaintiff's claim is similar to the hypothetical prisoner because he has not alleged ongoing Eighth Amendment violations; in fact, all of his allegations stem from the November 1999 riot. Nevertheless, all of the reasons for requiring administrative exhaustion are present in plaintiff's case. Bringing his claims to the attention of prison authorities would have enabled them to investigate his allegations of Eighth Amendment violations, thus giving them the first opportunity to scrutinize any constitutional violations. At the least, filing a claim might have helped to narrow the dispute or to develop the factual record. And finally, allowing the complaint system to work without judicial intervention would encourage development of an effective system. See Perez, 182 F.3d at 537-38; see also Nyhuis, 204 F.3d at 74.

Plaintiff has presented proof that he filed an administrative grievance with the Wisconsin Department of Corrections, complaining of a procedural due process violation; he was denied leave to proceed in forma pauperis on this claim in the May 26 order. Plaintiff has failed to submit proof that he exhausted his administrative remedies on his Eighth Amendment claims against any of the defendants. Although plaintiff filed an administrative complaint in Wisconsin after his transfer to the Supermaximum Correctional Institution in Boscobel, Wisconsin, he has not shown that he exhausted his claims against defendants Litscher and Schneiter, both Wisconsin Department of Corrections employees. The Seventh Circuit has held that "courts merely need to ask whether the institution has an internal administrative grievance procedure by which prisoners can lodge complaints about prison conditions. If such an administrative process is in place, then § 1997e(a) requires inmates to exhaust those procedures before bringing a prison conditions claim." Perez, 196 F.3d at 734. Plaintiff had an available internal grievance procedure in Wisconsin that he failed to use to file a complaint against defendants Litscher and Schneiter alleging their failure to protect him from harm. See Wis. Admin. Code DOC §§ 310.01 - 310.19. Even if there was no effective remedy available to plaintiff on his Eighth Amendment claims through the Wisconsin administrative grievance system, § 1997e(a) requires "that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733. I am now persuaded that I must

dismiss plaintiff's complaint against defendants Litscher and Schneiter because of plaintiff's failure to exhaust his administrative remedies pursuant to § 1997e(a).

It may be the case that plaintiff filed a complaint or attempted to file a complaint against CCA defendants John Doe #1, John Doe #2 and John Doe #3, Charles Blanchett and Percy Pitzer before he was transferred from Tennessee or by mail after he was transferred. See Perez, 182 F.3d at 534 (holding that § 1997e applies to claim of excessive force and reading language in light of McCarthy v. Bronson, 500 U.S. 136 (1991), in which the Supreme Court held that when Congress used the phrase "prisoner petitioners challenging conditions of confinement" in 28 U.S.C. § 636(b)(1)(B), it meant to include prisoner petitions relating both to continuous conditions and to isolated episodes of unconstitutional conduct, such as claim of excessive force); Freeman v. Francis, 196 F.3d 641, 643-44 (6th Cir. 1999) (claim of excessive force is covered by exhaustion requirement of § 1997e(a)); Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997) (claims of excessive force and inadequate medical care covered by exhaustion requirements). I will give plaintiff two weeks to submit proof of administrative exhaustion on his claims against those defendants or to show that he was unable physically to file a complaint before he was transferred because of circumstances at Whiteville or after he was transferred to Wisconsin or that the administrative grievance procedure at Whiteville is unavailable to prisoners who have been transferred from the facility.

II. REQUEST FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiff requests leave to file an amended complaint pursuant to Fed. R. Civ. P. 15 to correct the name of proposed defendant Lt. Davis and to provide additional factual support for his due process claim. Rule 15(a) states that "a party may amend [its] pleading only by leave of court" and that "leave shall be freely given when justice so requires." Whether to grant leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. See Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995). The Court of Appeals for the Seventh Circuit has enumerated four conditions that justify denying a motion to amend: undue delay; dilatory motive on the part of the movant; repeated failure to cure previous deficiencies; and futility of the amendment. See Cognitest Corp. v. Riverside Publishing Co., 107 F.3d 493, 499 (7th Cir. 1997). In addition, a motion to amend should not be granted if it will unduly prejudice the opposing party. See Samuels v. Wilder, 871 F.2d 1346, 1351 (7th Cir. 1989). In this case, it is necessary to determine whether granting plaintiff leave to file an amended complaint would be futile. An amendment is futile if it could not withstand a motion to dismiss. See Arazie v. Mullane, 2 F.3d 1456, 1464 (7th Cir. 1993). Even if I granted plaintiff's leave to file an amended complaint, the Prison Litigation Reform Act requires that the court deny leave to proceed on claims in plaintiff's proposed amended complaint that are

legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief.

Plaintiff's request will be denied because allowing him to file an amended complaint would be futile for two reasons. First, it is unnecessary to amend plaintiff's complaint to reflect Lt. Davis's correct name because she was dismissed from this lawsuit pursuant to the May 26 order. Second, although plaintiff attempts to supplement his due process claim, nothing in the complaint states a viable due process claim because his allegations do not establish that he was deprived of a protectible liberty interest. A procedural due process violation against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Plaintiff's allegations that he was given sixty days' disciplinary segregation and was reclassified to a higher security level and transferred to the Supermaximum prison do not constitute protectible liberty interests. See Sandin v. Conner, 515 U.S. 472, 483-484 (1995) (stating that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."). Plaintiff's request for leave to file an amended complaint will be denied.

III. APPOINTMENT OF COUNSEL

Plaintiff has requested that counsel be appointed to assist him. I will stay a decision on this motion pending a determination whether plaintiff has exhausted his administrative remedies.

ORDER

IT IS ORDERED that

1. The motion of defendants Jon E. Litscher and Steven Schneiter to dismiss plaintiff's complaint is GRANTED;

2. A decision whether plaintiff Dwayne Cox may proceed on his claims against defendants Charles Blanchett, Percy Pitzer, John Doe #1, John Doe #2 and John Doe #3 is STAYED until August 7, 2000 in order for plaintiff to submit proof that he exhausted his administrative remedies before filing his proposed complaint or an explanation for his failure to do so;

3. Plaintiff's motion for leave to file an amended complaint is DENIED; and

4. Plaintiff's motion for appointment of counsel is STAYED.

Entered this 24th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge